

Pages 1 - 11

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable Charles R. Breyer, Judge

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
VS.	)	<b>NO. CR 21-00013 CRB</b>
	)	
MARC NUNEZ,	)	
	)	
Defendant.	)	
_____	)	

San Francisco, California  
Wednesday, March 1, 2023

**TRANSCRIPT OF PROCEEDINGS**

**APPEARANCES:**

For Plaintiff:

STEPHANIE M. HINDS  
UNITED STATES ATTORNEY  
450 Golden Gate Avenue, 11th Floor  
San Francisco, California 94102

**BY: KEVIN YEH**  
**ASSISTANT UNITED STATES ATTORNEY**

For Defendant:

JODI LINKER  
FEDERAL PUBLIC DEFENDER  
450 Golden Gate Avenue  
Room 19-6884, Box 36106  
**BY: ELISSE M. LAROCHE**  
**ASSISTANT FEDERAL PUBLIC DEFENDER**

Also Present: **Katrina Chu, U.S. Probation**

REPORTED BY: Ana Dub, RMR, RDR, CRR, CCRR, CRG, CCG  
CSR No. 7445, Official United States Reporter

Wednesday - March 1, 2023

10:00 a.m.

P R O C E E D I N G S

---o0o---

(Defendant present, out of custody.)

**THE CLERK:** Okay. The next matter is U.S.A. vs. Marc Nunez.

**MR. YEH:** Good morning, Your Honor. Kevin Yeh on behalf of the United States.

**THE COURT:** Good morning.

**THE CLERK:** This is Criminal Action CR 21-0013.

**MS. LAROCHE:** Good morning, Your Honor. Elisse Larouche on behalf of Marc Nunez, who's present and out of custody.

**PROBATION OFFICER CHU:** And good morning, Your Honor. Katrina Chu with U.S. Probation.

**THE COURT:** Good morning.

So my clerk advised me that the Government wants to continue sentencing, the hearing in this matter.

And do you have a reason for that?

**MR. YEH:** Yes, Your Honor.

I'm very sorry to waste the Court's time, and I apologize for doing this with such short notice. But the Government would like to request continuing the sentencing for 30 days so that we can fulfill our obligations under the Crime Victims Rights Act to contact all potential victims about the case,

1 which we unfortunately haven't finished doing yet.

2 We were unable to reach a stipulation with defense  
3 counsel, who we informed yesterday, which is why the Court is  
4 hearing about it for the first time today.

5 I don't make any excuses, but there are at least three  
6 more victims that we would like to contact, and so we're hoping  
7 to get an additional 30 days to complete that task.

8 **MS. LAROCHE:** Your Honor, the Government did contact  
9 us yesterday. And not to be difficult, but we don't believe  
10 it's in the -- I don't believe it's in the best interest of my  
11 client to continue, so we did not agree to stipulate.

12 **THE COURT:** Okay. Well, I thought I would take  
13 two minutes and explain where I am in the sentencing process  
14 because it may inform the next 30 days or whatever period of  
15 time is necessary.

16 The Presentence Report contains a great deal of  
17 information. The nature of the information, for the most part,  
18 has been inappropriate conduct with teenagers. There is,  
19 however, an allegation that there was inappropriate conduct  
20 directed towards a child, a young child, and I have the  
21 victim's statement there. I also have defense counsel's series  
22 of statements, series of arguments or statements, or whatever  
23 it is, rebutting that allegation.

24 And that incident or series of incidents involving a child  
25 would drastically change the sentence that the Court would

1 impose. If I were to consider it as relevant conduct or as  
2 conduct germane to a decision as to sentencing, even though it  
3 may not, quote, enhance the sentence from a guideline point of  
4 view, it would certainly influence in a substantial way the  
5 sentence that I would impose.

6 After all, if teenagers are involved -- 17, 16, that  
7 age -- in the conduct of the defendant, that would be one way I  
8 would look at it. If it involved a six-year-old or a  
9 five-year-old or a seven-year-old or an eight-year-old, that is  
10 to say, and I'm just using that as an example, I would give a  
11 totally different sentence. And I think every judge would, by  
12 the way. So I don't think I'm surprising anybody by that  
13 declaration.

14 So I will give the Government the opportunity to present  
15 whatever argument or evidence they want to which corroborates  
16 the young boy's victim impact statement, which, of course, was  
17 written by the parents.

18 And not for a moment am I suggesting that this child  
19 wasn't victimized in a totally terrible way. The question is,  
20 is the defendant respon- -- is he the person who did it. And  
21 the defense has come in and, quite credibly, raised questions  
22 as to that statement.

23 So that's what's of concern to the Court. I don't know  
24 how else to put it. I mean, it's not just lining up more  
25 people or any of that. I understand what has been uncovered by

1 the police report and -- pardon me -- the Probation Report.

2 I also think it's not really an issue -- a couple of  
3 things are not an issue. One, it's not an issue as to the  
4 number of images because four circuits have held that even if  
5 it's duplicative images, it counts, each image counts. And  
6 that's the position of the United States Sentencing Commission,  
7 and that's the position of the Sentencing Guidelines as well in  
8 the application note. So we're over 300, any way you look --  
9 I think it's -- is it over 300?

10 **MS. LAROCHE:** Yes, Your Honor.

11 **MR. YEH:** Yes.

12 **THE COURT:** We're over 300 any way you look at it.

13 The issue as to whether or not a particular person in a  
14 particular video which showed only a portion of that person is  
15 a minor or is not a minor is something I don't have to decide.  
16 I accept the Government's presentation of that. It was  
17 verified by the Probation Department. But it's not going to be  
18 material to the sentencing. Okay?

19 **MS. LAROCHE:** Understood, Your Honor.

20 **THE COURT:** All right. So don't waste your time on  
21 that.

22 I turn to the defense. Don't waste -- no, no.

23 Again, to the prosecution. The prosecution makes the  
24 argument, in the special assessment of \$5,000, that it doesn't  
25 make any difference that he's indigent. Is that the argument?

1           **MR. YEH:** No, Your Honor. We just believe that the  
2 defendant either currently has the ability to pay or will upon  
3 release from any term of imprisonment.

4           **THE COURT:** Well, so does -- everybody has the --  
5 anybody released from imprisonment.

6           By the way, that's not what the statute says. You better  
7 read the statute. I read it for the first time this morning.  
8 I read it wrong, and then I reread it, thanks to my law clerk.

9           But the difference between a special assessment of -- the  
10 typical \$100 special assessment and this, I think, is for the  
11 special assessment of \$100, it applies to everybody. This  
12 applies to non-indigent. So that's a big distinction.

13           I think he is indigent, and I'm not going to -- so my  
14 inclination is not to impose that, given his financial  
15 situation.

16           But I think that's all by the by. I think the big  
17 issue -- and believe me, it's an important issue for this  
18 defendant and for the integrity of the sentencing process.  
19 It's a big issue to figure out what, if anything -- what has  
20 happened in the past, because that's the conduct that I have to  
21 sentence on and there are two very, very different types of  
22 sentencing that would be imposed.

23           Okay.

24           **MS. LAROCHE:** Your Honor.

25           **THE COURT:** Let me answer your questions. I wanted to

1 sort of talk about this --

2 **MS. LAROCHE:** Okay.

3 **THE COURT:** -- so you see where I'm coming from.

4 By the way, I have to tell you, even if the Government  
5 hadn't requested a continuance, I would have given one.

6 **MS. LAROCHE:** Well, Your Honor, I just want to pause  
7 for a moment just so that -- make sure we're all on the same  
8 page, that the Government has taken the position that they  
9 couldn't prove those allegations and wouldn't be putting on a  
10 presentation of such --

11 **THE COURT:** They can -- I'm giving them the  
12 opportunity.

13 Here is the problem. The question really is: Is there  
14 evidence, is there evidence of a type, since it's in dispute,  
15 that would satisfy the requirements of, well, 6A1.3 and  
16 Rule 32, Rule 32(i)(3)(B) and (C). So there's a whole  
17 mechanism. You see, I can't strike it.

18 I think what I've been doing is wrong up to now, which is  
19 I've asked the Probation Department to amend their report to  
20 take out this and take out that. I don't know that I can do  
21 that. They have an obligation; they have a legal obligation to  
22 present evidence, to present information to me that may impact  
23 sentencing. That's their obligation.

24 If I disagree with it, if I don't want to consider it for  
25 the very reasons that you gave, I have to leave it in the

1 Probation Report but append to the J&C my views as to why I'm  
2 not considering it for sentencing purposes.

3 You see, I think this is a perfect example, a perfect  
4 example of what I would have to do. So I don't want to walk  
5 into it and blindside any lawyer. I want them to see what's  
6 going on in my mind so that they come back and they say,  
7 well -- they may come back and they say: You've raised, like,  
8 ten different issues of why you think it's not -- why you think  
9 it's not your client.

10 Let's leave it at that. Okay?

11 **MS. LAROCHE:** Yes.

12 **THE COURT:** And to me, they're powerful reasons.  
13 They're powerful reasons.

14 So I want to give the Government the opportunity to look  
15 at those reasons. I know they've had an opportunity to look at  
16 the reasons, but to say what they want to say about them.

17 Now, they may very well come back and say, "We're  
18 submitted; we're not going to argue that."

19 Okay? But you see, that makes the whole difference in  
20 sentencing. Now, you can argue to me it shouldn't; but the  
21 problem really is this: The Sentencing Guidelines for child  
22 pornography are the least -- the second-least-followed  
23 Sentencing Guidelines by federal judges.

24 And I have to do a couple of things. One thing I have to  
25 do correctly is do the right math on the Sentencing Guidelines.



1 But then where I come out in terms of variance is enormously  
2 significant. And let me just go on a bit about that.

3 The normal child pornography case that I have seen brought  
4 by the U.S. Attorney's Office involves children. And I don't  
5 mean children -- anybody under 18. I mean children who are  
6 from one year old to ten years old and then sometimes  
7 teenagers. But this seemed to be a case of almost all,  
8 I think, teenagers.

9 Now, I'm not saying it's not a crime, but I'm saying it's  
10 a very different crime from all of the images that I've seen,  
11 unfortunately, over 25 years where there have been horrendous  
12 photographs of abuse of infants. Of infants.

13 Well, I mean, you see that, and you have a -- as a human  
14 being, you have a reaction a particular way, which is different  
15 from the reaction that you would get if somebody is 17 years  
16 old and maybe even lies about his age, or 18 and lies about his  
17 age, of which this is replete, the Sentencing Memoranda.

18 So everybody got a picture now? Is it clear on all sides  
19 what I'm interested in? Any issues?

20 **MR. YEH:** Crystal clear, Your Honor.

21 **THE COURT:** Ms. Larouche?

22 **MS. LAROUCHE:** Your Honor, we understand -- definitely  
23 agree that the allegations drastically change what would happen  
24 here, and that's why we made such a full fund effort to show  
25 the issues with them. So that's understood, Your Honor.

1 I would ask for leave to file supplemental briefing.

2 **THE COURT:** Granted.

3 **MS. LARUCHE:** Thank you. Particularly to the issue  
4 of whether this information should stay in the PSR,  
5 understanding what Your Honor has laid out.

6 **THE COURT:** Granted. Granted. You can say anything  
7 you want to.

8 **MS. LARUCHE:** Thank you.

9 **THE COURT:** I'm not limiting you in any way.

10 **MS. LARUCHE:** Thank you.

11 **THE COURT:** Okay.

12 **THE CLERK:** The next hearing date, April 19th at  
13 10:30.

14 **MR. YEH:** That's fine. Thank you.

15 **THE COURT:** Okay. Thank you.

16 **MS. LARUCHE:** Sorry, Lashanda. Just one moment.  
17 What was that?

18 **THE CLERK:** April 19 at 10:30.

19 **MS. LARUCHE:** Okay. Thank you very much.

20 **THE CLERK:** Okay.

21 **MR. YEH:** Thank you, Your Honor.

22 **PROBATION OFFICER CHU:** Thank you.

23 **THE COURT:** Thank you.

24 Thank the Probation Department too.

25 **PROBATION OFFICER CHU:** Thank you.

1           **THE COURT:** Very, very careful report.

2                   (Proceedings adjourned at 10:16 a.m.)

3                           ---o0o---

4  
5                           **CERTIFICATE OF REPORTER**

6           I certify that the foregoing is a correct transcript  
7 from the record of proceedings in the above-entitled matter.

8  
9   DATE: Monday, March 13, 2023

10  
11                           Ana Dub  
12

13                           \_\_\_\_\_  
14                   Ana Dub, RMR, RDR, CRR, CCRR, CRG, CCG  
15                   CSR No. 7445, Official United States Reporter  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25